TABLE OF CONTENTS

APPENDIX A, Decision of the Supreme Court of California..... 2a

APPENDIX B, Declaration of attorney Brent Romney..... 3a

APPENDIX C, Declaration of attorney William J. Kopeny..... 6a

APPENDIX D, Declaration of John Steadman Nilsen..... 29a

APPENDIX E, Declaration of attorney Correen Ferrentino..... 32a

APPENDIX F, Court of Appeals Decision..... 35a

Appendix A

S1765296

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re John Steadman Nilsen on Habeas Corpus.

The petition for writ of habeas corpus is denied.

SUPREME COURT
FILED

MAY 20 2010

Frederick K. Ohlrich Clerk

_____
Deputy

GEORGE

_____
Chief Justice

Appendix B

Declaration of Brent Romney

I, Brent F. Romney, say:

1. I am an attorney at law, licensed to practice in the Courts of the State of California, and I am in good standing with the California State Bar.

2. I was retained to represent petitioner, John Steadman Nilsen, on direct appeal from Orange County Superior Court case No. 04WF0832; Court of Appeal case number G038070. I filed Nilsen's opening and reply briefs. In April, 2008, I associated in Attorney Thomas Dunn as co-counsel. On June 17, 2008, Mr. Dunn argued Nilsen's case before the Court of Appeal, Fourth Appellate District, Division Three.

3. On June 30, 2008 Nilsen's conviction was affirmed by the Court of Appeal, in an unpublished opinion.

4. In a letter dated February 5, 2009, I wrote to Nilsen to advise him of the decision of the appellate court and inform him that a Petition for Rehearing with the Court of Appeal and a Petition for Review with the California Supreme Court had been filed. I wrote: "I want to update you on the status of your appeal. On September 22, 2008, the Court of Appeal affirmed your conviction. Since that date, a Petition for Re-Hearing was filed and denied. A subsequent petition to the Supreme Court to hear and consider your appeal was also denied. I am dismayed by the

decisions of the appellate courts in your case. However, I have now exhausted all appellate remedies in your case."

5. I intended to cause a Petition for Rehearing and a Petition for Review with the California Supreme Court be filed in Nilsen's case, but neither were filed. As stated in my May 18, 2009 e-mail to attorney Bill Kopeny, "I recall asking Tom [co-counsel Tom Dunn] to file Application for Reconsideration, and if denied, petition Supreme Court for hearing (sic). I then began another 187 jury trial, then another. I didn't talk to Tom for a while. John Nilsen inquired as to the status of his case. I had heard nothing re Tom or appeal (sic), so I wrote John Nilsen and advising him of the outcome (sic). I recall I told him that application for rehearing was denied and supreme court did not grant hearing (sic), assuming I would have heard otherwise if anything different had occurred. I also told John Nilsen that a writ should be considered . . . A few days later, I contacted Tom, who told me he thought I was going to file application for reconsideration, then petition supreme court if necessary (sic) so, no application for hearing was filed nor was petition to supreme court filed."

6. In the February 5 letter, I provided Nilsen the wrong date that the Court of Appeal affirmed his conviction. I wrote that the conviction was affirmed on September 22, 2008. The conviction was actually affirmed June 30, 2008.

7. When retained to represent Nilsen, I advised him that I would file his appeal and ensure that his

state appellate rights were exhausted. I was aware he might want to later file a writ of habeas corpus in state and federal court.

8. The failure to file the Petition for Rehearing and Petition for Review to exhaust state remedies was not strategic and was not due to any fault or delay on the part of Mr. Nilsen.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: 9-14-09

/s/
Brent F. Romney
Attorney At Law

Appendix C

Declaration of William J. Kopeny

I, William J. Kopeny, say:

1. I am an attorney at law, licensed to practice in the Courts of the State of California and of the United States. I have been a member in good standing of the California State Bar since December 20, 1974. I am certified by the California State Bar as a specialist in the areas of Criminal Law and Appellate Law.

2. This declaration is made at the request of Correen Ferrentino, Esq., attorney for Nilsen, California State Prison Number C-28087.

3. My entire acquaintance and interaction with Mr. Nilsen took place between April and June, 2009.

4. I received a letter dated May 1, 2009[1] from Mr. Nilsen asking me to consider representing him to seek to attack his conviction in Orange County Superior Court case number 04WF0832, in which he was sentenced to an eighty (80) year prison term. Enclosed in Mr. Nilsen's letter was a letter dated February 5, 2009 from attorney Brent Romney, an attorney with whom I have been familiar for many years. I have attached a copy of the 2/5/09 Romney letter as Exhibit A to this Declaration.

5. In the letter, Mr. Romney wrote:

---

[1] I believe this letter was actually sent late in April because it came in an envelope I retained which is postmarked 4/28/09.

"On September 22, 2008, the court of Appeal affirmed your conviction. Since that date a Petition for Re-Hearing was filed and denied. A subsequent petition to the Supreme Court to hear and consider your appeal was also denied. [¶] I am dismayed by the decisions of the appellate courts in your case. However, I have now exhausted all appellate remedies in your case." Please see Exhibit A, 2/5/09 Romney Letter to John Steadman Nilsen, C28087.

6. On May 2, 2009 I mailed and sent via facsimile a letter to Mr. Romney indicating that I had been contacted by John Nilsen for possible post-appeal representation, asking for copies of the appellate briefs, including the Petition for Rehearing and Petition for Review, and the orders denying each as referenced in Exhibit A. I have attached a copy of my 5/2/09 letter to Mr. Romney as Exhibit B to this Declaration. Please see Exhibit B, 5/2/09 Kopeny Letter to Brent F. Romney, Esq..

7. Sometime after receiving Mr. Nilsen's letter, I researched the online website for his Court of Appeal case and learned: (a) that the California Court of Appeal, Fourth District, Division Three on line case information for case number G038070 indicated that the opinion affirming Mr. Nilsen's conviction in full was filed on June 30, 2008. I have attached a copy of the California Courts—Appellate Courts Case Information Docket for this case as Exhibit C to this Declaration.

8. No Petition for Rehearing was shown on the docket and it contained dates following June 30, 2008 beyond the 15 day Remittitur Issued on

September 3, 2008, but did not note any Petition for Review being filed. Please see Exhibit C, California Courts-Appellate Courts Case Information Docket for Case Number G038070, p.3 of 4.

9. I also searched the on line records for the California Supreme Court which also contained no record of any Petition for Review being filed on behalf of Mr. Nilsen in this case.

10. I did not receive a response to my May 2, 2009 letter to Mr. Romney, which was faxed and mailed, so on May 18, 2009 I researched Mr. Romney's public e-mail address as listed on the California State Bar website and sent him an e-mail. In that e-mail thread, attached as Exhibit D to this Declaration, I: (a) referenced my prior (5/2/09) letter; (b) indicated that there may be a timing issue for Mr. Nilsen; and (c) requested a reply to my letter. Please see Exhibit D, 5/18/09 Kopeny E-mail to Romney.

11. Mr. Romney responded to my e-mail on May 18, 2009 stating I substance: (a) he had received my letter dated 5/2/09; (b) he was then [on 5/18/09] in trial; (c) he had Mr. Nilsen's entire appeal file; (d) he worked on the appeal with Thomas Dunn, Esq.; (e) he "recall[ed] asking Tom [Dunn] to file an Application for Reconsideration, and if denied, petition Supreme Court for hearing."; (f) John Nilsen inquired of the status of the case, and at the time he [Romney] had heard nothing but he assumed if rehearing or review had been granted, he would have heard so he wrote and told Mr. Nilsen that both had been denied; (g) "A few days later" he

spoke with Mr. Dunn, who told Romney that he thought Romney was going to file both petitions; (h) "So, no application for rehearing was filed, nor was petition to Supreme Court filed." Please see Exhibit D, 5/18/09 Romney E-mail to Kopeny.

12. In the e-mail, Mr. Romney expressed views that caused me to conclude that neither he nor Mr. Dunn were familiar with California Rule of Court, Rule 8.508, which allows appellate counsel to file an abbreviated Petition for Review in the California Supreme Court for the purpose of exhausting state remedies, which is a prerequisite for filing a federal petition under 28 U.S.C. §2254 (habeas corpus by a state prisoner) which seeks to raise federal constitutional issues raised in the state direct appeal. I reached this conclusion in part because Mr. Romney told me in the 5/18/09 e-mail that he and Dunn discussed the fact (sometime after Romney wrote to Mr. Nilsen in May of 2009) that the "petition to supreme court had nothing sufficiently novel that supreme court would grant cert." (sic)[2], but he went on to state that one of the issues on appeal was sufficiency of the evidence,

---

[2] I assume Mr. Romney meant to refer to a petition to the Supreme Court of California seeking Review, not certiorari. If he actually meant to discuss a "cert" petition, then it is also apparent that there is also a misunderstanding of the need to fairly present any federal claim to the United States Supreme Court. Because, however, Mr. Romney's e-mail referred to a "petition for hearing" in the California Supreme Court, I simply concluded that he is not readily familiar with appellate court nomenclature, and that he may rely on Mr. Dunn for technical knowledge in appeal.

which is a federal constitutional issue in criminal cases.[3]

13. It is my understanding that: (a) after being retained to represent Mr. Nilsen on direct appeal, Mr. Romney assured Mr. Nilsen that he would "do everything I can to have conviction reversed"[4]; (b) Mr. Nilsen relied on Mr. Romney to follow all procedural steps available to present his claims to the California Appellate Courts on direct appeal, including filing a Petition for Rehearing in the Court of Appeal and a Petition for Review in the California Supreme Court; (c) based on Mr. Romney's 2/5/09 letter to Mr. Nilsen (Exhibit A), and on Mr. Romney's 5/18/09 e-mail to me, Mr. Romney believed it was his obligation to file both the Petition for Rehearing and Petition for Review for Mr. Nilsen; (d) Mr. Nilsen believed these petitions would be filed for him; (e) Mr. Romney *intended* to cause them to be filed, but they never were.

14. On May 19, 2009, I wrote to Mr. Nilsen, advising him that Mr. Romney had stated to me that he has not filed the Petition for Rehearing or the Petition for Review in the California Supreme Court.

15. In early June, 2009, I received a letter from Mr. Nilsen asking for advice in view of the fact that he had not exhausted state remedies on his direct

---

[3] Please see Exhibit D.

[4] Please see May 29, 2008 Romney Letter to Mr. Nilsen, attached as Exhibit E.

appeal. I wrote back to him on June 19, 2009, advising him that it was possible for him to seek relief from his counsel's failure to file the Petition for Review to exhaust state remedies on his direct appeal issues. In that letter I also referred him to attorneys who I know handle habeas corpus matters.[5]

16. Based on the information I have about Mr. Nilsen's situation, I believe that he has valid grounds for a petition for writ of habeas corpus under *either* the rationale of *In re Benoit* (1973) 10 Cal.3d 73 [because he reasonably relied on assurances of his counsel, who did not communicate with him about his case until almost 8 months after his conviction was affirmed in the Court of Appeal, and then, in his 2/5/09 letter inaccurately advised him that the Petition for Rehearing and Petition for Review he had promised to file *had been filed*, and denied]; or *Roe v. Flores-Ortega* (2000) 528 U.S. 470 [because appellate counsel was ineffective for failing to file a Petition for Review to exhaust state remedies, the availability of which he was unaware, and pursuant to *Roe*, Mr. Nilsen was prejudiced because he was denied that appellate proceeding]. In this regard it should also be noted that the United States Supreme Court has established that a state prisoner who is entitled to appeal is constitutionally entitled to "a complete and effective

---

[5] Although I have prepared and filed dozens of habeas corpus petitions during the 34 years I have been practicing law, in general, I no longer handle habeas corpus cases.

appellate review of his conviction..."[6] and that in *Roe v. Flores-Ortega*, supra, the Supreme Court described its own holding as follows: "'[W]e hold that when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal." *Roe*, 528 U.S. at p. 484.

Executed this August 21, 2009 at Irvine, California.

I declare under penalty of perjury that the foregoing is true and correct.

/s/
William J. Kopeny
Attorney at Law

---

[6] *Entsminger v. Iowa* (1967) 386 U.S. 748, 752, 87 S.Ct. 1402, 1404, 18 L.Ed.2d 501.

EXHIBIT A
TO DECLARATION OF WILLIAM J. KOPENY
(REFERENCE—JOHN NILSEN)

Blumenthal
Law Offices
Devoted exclusively to the defense of the accused

February 5, 2009

John Steadman Nilsen C28087
CSP-SAC C3-11
P.O.Box 29066
Represa, CA 95671

Dear Mr. Nilsen,

I want to update you on the status of your appeal. Unfortunately, I do not have good news. As you are aware, I asked E. Thomas Dunn, a law professor and very experienced appellate attorney, to work with me on your appeal. The Appellant's Opening Brief on November 1, 2007. The Attorney General filed the Respondent's Brief on March 3, 2008, I was present when Mr. Dunn argued your appeal orally before the Court of Appeal. I had Mr. Dunn argue the appeal because he has previously worked as a research attorney at the Court of Appeal and was personally familiar with the legal concerns of each of the justices who considered your appeal.

On September 22, 2008, the Court of Appeal affirmed your conviction. Since that date, a Petition for Rehearing was filed and denied. A subsequent

petition to the Supreme Court to hear and consider your appeal was also denied.

I am dismayed by the decisions of the appellate courts in your case. However I have now exhausted all appellate remedies in your case. The appellate court rarely appoints counsel to represent an inmate for purposes of filing a *writ of habeas corpus*; they do so only when it appears there is a clear indication that trial counsel was ineffective or newly discovered evidence of your innocence exists. I am not of the opinion that either basis exists in your case. If you or your family desire, however, to pursue a *writ of habeas corpus*, I recommend tyou promptly contact E. Thomas Dunn, who specializes in handling appeals and writs in the appellate courts. You can contact him as follows:

Edward Thomas Dunn
675 N. Euclid Street, Suite 301
Anaheim, CA 92801

Please contact me if you have any questions or if I may be of service to you in the future.

Very truly yours,
Brent F. Romney
cc. Marilyn Dutkus

EXHIBIT B
TO DECLARATION OF WILLIAM J. KOPENY
(REFERENCE—JOHN NILSEN)

Law Offices of
William J. Kopeny & Associates
May 2, 2009

Via Facsimile (951-788-6303)
And U.S. Mail

Brent F Romney, Esq.
Blumenthal Law Offices
The Riverside Barrister Building
3993 Market Street
Riverside, CA 92501

Re: John S. Nilsen

Dear Mr. Romney:

I have been contacted by John Nilsen for possible post-appeal representation.

To that end, I am asking that you send to me your appellate briefs, including the Petition for Rehearing and Petition for Review, and the orders denying each, as referenced in your February 5, 2009 letter to Mr. Nilsen.

Thank you for your courtesy in this matter.

Very truly yours,

WILLIAM J. KOPENY & ASSOCIATES

/s/
William J. Kopeny

EXHIBIT C
TO DECLARATION OF WILLIAM J. KOPENY
(REFERENCE—JOHN NILSEN)

CALIFORNIA APPELLATE COURTS

Case Information
4th Appellate District Division 3
Court date last updated: 04/30/2009 06:05 PM
Docket (Register of Actions)
The People v. Nilsen
Case Number G038070

Date: 01/05/2007
Description: Notice of Appeal lodged/received (criminal).
Notes: By aplt John Steadman Nilsen: 80 yrs to life w/three consecutive terms of life w/o parole

Date: 01/05/2007
Description: Notice to reporter to prepare transcript.
Notes: CSR: J. Bullard

Date: 02/07/2007
Description: Record on appeal filed.
Notes: CT-3 w/prob. ofcr. rpt., RT-6. [w/11 confidential envelopes].

Date: 02/07/2007
Description: Sealed document filed******
Notes: 9 sealed envelopes filed: 8 confidential envelopes [pages 6&7, pages 9-11, pages 12-13, pages 16&17, pages 18 &19, pages 141-144, pages 315-323, pages 507-51]; 1 In-camera hearing [pages53-55].

Date: 02/07/2007
Description: Marsden transcript sent.
Notes: 2 Marsden hearings [10/25/06 pp.622-624 and 10/26/06 pp. 867-870].
Date: 03/13/2007
Description: Counsel appointment order filed.
Notes: Atty Janyce K. Blair appointed for aplt John Steadman Nilsen.

Date: 04/09/2007
Description: Requested—extension of time.
Notes: for AOB

Date: 04/12/2007
Description: Granted—extension of time.
Notes: 1st ext aob ext'd to 5/23/07

Date: 04/18/2007
Description: Substitution of attorneys filed for:
Notes: Filed on 4/17/2007 – Appellant subs out appt'd atty/Janice Blair and subs in atty/Brent F. Romney.

Date: 05/22/2007
Description: Requested—extension of time

Date: 05/24/2007
Description: Appellant notified pursuant to rule 8.220 (a)(1).
Notes: Notice RESCINDED on 5/25/07

Date: 05/25/2007
Description: Filed order vacating and appointing new counsel.

Notes: Atty Janyce Blair is vacated and Brent Romney is retained as counsel submitted from ADI.

Date: 05/25/2007
Description: Note:
Notes: Notice rescinding default notice for aob submitted this date.

Date: 05/25/2007
Description: Granted—extension of time.
Note: 1st ext – aob ext's to 6/22/07

Date: 06/25/2007
Description: Requested—extension of time.

Date: 06/25/2007
Description: Granted—extension of time.

Date: 07/26/2007
Description: Requested—extension of time.

Date: 07/27/2007
Description: Granted—extension of time.
Note: 4th ext – aob ext'd to 8/23/07

Date: 08/23/2007
Description: Requested—extension of time

Date: 08/23/2007
Description: Granted—extension of time.

Date: 09/25/2007
Description: Appellant notified pursuant to rule 8.360.

Date: 10/24/2007
Description: Requested—extension of time.

Date: 10/25/2007
Description: Granted—extension of time.

Date: 11/01/2007
Description: Appellant's opening brief.

Date: 11/29/2007
Description: Requested—extension of time.

Date: 11/29/2007
Description: Granted—extension of time.

Date: 12/27/2007
Description: Requested—extension of time.

Date: 12/27/2007
Description: Granted—extension of time.

Date: 01/29/2008
Description: Requested—extension of time.

Date: 01/30/2008
Description: Granted—extension of time.
Notes: 3rd ext to 03/03/08 for RB

Date: 03/03/2008
Description: Respondent's brief.

Date: 03/07/2008
Description: Argument letter sent.

Date: 03/21/2008
Description: Requested—extension of time.

Date: 03/21/2008
Description: Granted—extension of time.

Date: 03/27/2008
Description: Request for oral argument filed by:
Notes: Atty Brent Romney counsel for aplt. Time estimate – 15 mins.

Date: 04/14/2008
Description: Appellant's reply brief.

Date 04/14/2008
Description: Case fully briefed.

Date 04/14/2008
Description: Association of attorneys filed for:
Notes: Aplt associates in Att/Thomas Dunn as co-counsel with atty/Brent F. Romney. Original ec'd (to fax) 4/15/08. (no signature of atty/Brent Romney, he will fax a signed assn. of counsel, atty. Out of area at present.)

Date: 04/23/2008
Description: Association of attorneys filed for:
Notes: Aplt's aaty/Brent Romney assco. in atty/Thomas Dunn as co-counsel.

Date: 04/24/2008
Description: Case briefed and on assignment panel.
Notes: For June 2008 Calendar.

Date: 05/08/2008
Description: Calendar notice sent. Calendar date:
Notes: 6-17-08 at 9:00 a.m.

Date: 06/17/2008

Description: Cause argued and submitted.
Notes: Atty E. Thomas Dunn, Jr. argued for aplt.
Andrew Mestman, Deputy AG argued for resp.

Date: 06/30/2008
Description: Opinion filed.
Notes: AFFIRMED. (signed unpublished) Ikola/Sills Bedsworth

Date: 06/30/2008
Description: Submission order filed.

Dates: 09/03/2008
Description: Remittitur issued.

Date: 09/03/2008
Description: Case complete.

Date: 03/11/2009
Description: Sealed file/record sent to storage.

2009 Judicial Council of California

EXHIBIT D
TO DECLARATION OF WILLIAM J. KOPENY
(REFERENCE—JOHN NILSEN)

William J. Kopeny

From: Brent Romney
[bromney@blumenthallawoffices.com]

Sent: Monday, May 18, 2009 8:44 PM

To: William J. Kopeny

Subject: RE: John Nilsen Habeas

Hi Bill!

I got your letter; sorry I did not respond quickly. I'm in trial and everything else seems to get put off. Anyway, want to get back to you ASAP and share with you my recall of events re John Nilsen's appeal, I have his entire appeal file, and can provide it to you if you need it. Tom Dunn and I worked on it together. If you look at appeal there was not a lot to argue on appeal from the transcripts of the trial. We thought the Pub Def did pretty good job. Tom orally argued it because we felt he knew 4:3 panel better than I did. Court of appeal affirmed conviction. Afterwards, Tom and I talked about the decision, and both of us thought the court's decision was expected. In our discussions, I recall asking Tom to file Application for Reconsideration, and if denied,

petition Supreme Court for hearing. I then began another 187 jury trial, then another. I didn't talk to Tom for a while. John Nilsen inquired as to status of case. I had heard nothing re Tom or appeal, so I wrote John Nilsen and advised him of outcome. I recall I told him that application for rehearing was denied and supreme court did not grant hearing, assuming I would have heard otherwise if anything different had occurred. I also told John Nilsen that a writ should be considered, and I believe I told him (I don't have the letter in front of me) the writ would not be limited to the transcript of the trial. That is where newly discovered evidence or ineffective assistance of counsel could be raised. A few days later, I contacted Tom, who told me he thought I was going to file application for reconsideration, then petition supreme court if necessary. So, no application for hearing was filed, nor was petition to supreme court filed. Tom and I again discussed case and concluded that any basis for reconsidering ruling was slight if non-existent, and petition to supreme court had nothing sufficiently novel that supreme court would grant cert. Primary issue on appeal was sufficiency of ID testimony, and related issues. Tom and I also discussed whether we thought the publ defender was effective or not, and both of us felt she did quite a good job, given the evidence.

I hope this helps. I also hope you can find something credible that can be raised in petition for writ. Quite frankly, I do not see anything that may have merit, but that is why the writ attorney should always be another atty than the atty who handled the trial or the appeal. I'm glad he has contacted you. Please let

me know if I can provide you with any assistance. If you believe an IAC argument can be raised, either at trial or appeal level, I (and I am sure Tom) will be supportive and assist you, if possible. Nilsen's right to fair trial and appeal by competent attys is more important than any ego I may have as far as the appeal goes. Please let me know if I can help. Brent

---

From: William J. Kopeny
[mailto:wjk@writsnappeals.com]

Sent: Monday, May 18, 2009 6:19 PM

To: Brent Romney

Subject: John Nilsen Habeas

Dear Brent:

I sent you a letter a week or two ago, and I am writing to be sure you received it. There may be a time issue regarding this client's ability to file a timely state and/or federal habeas petition, and I would very much appreciate receiving a reply to my letter.

Thank you,

Bill Kopeny

EXHIBIT E
TO DECLARATION OF WILLIAM J. KOPENY
(REFERENCE—JOHN NILSEN)

LAW OFFICES OF
BRENT F. ROMNEY

101 S. Kraemer Blvd., Suite 240
Placentia, California 92870
Phone (714) 524-3314
Fax (714)524-3315

May 29, 2008

John S. Nilsen C-288087
CPS-SAC C3-111
P.O. Box 290066
Represa, CA 95671

Dear John,

Thank you for your letter dated March 19, 2008 wherein you ask several questions regarding the appellate briefs, and in particular, the response by the Attorney General. I want to address each of your questions.

Initially, the appeal can address constitutional issues (as we do in Argument #2 in the Opening Brief), legal error by the court, or sufficiency of the evidence (as we do in Argument #1). As I reviewed the entire transcript of the trial, I did not see any "legal error" by the judge. I also asked a very experienced appellate specialist, Tom Dunn, to review it also, and he came to the same conclusion. Thinking that two heads are better than one, I

requested the court's permission to associate Tom Dunn as co-counsel, since he and I spent a lot of time discussing your appeal. Under separate cover, you will receive that request of the court.

1) Eye witness identification issues are normally a "sufficiency of the evidence" issue. That is, it is a question of fact, and if there is substantial, credible evidence of the identification of the defendant, that appellate court will defer to that of the jury, and not re-weigh the evidence. However, if the evidence pertaining to the ID of the defendant is not substantial and credible, then it is a legal question. That is, if the evidence is so confusing and inconsistent that the appellate court concludes that no reasonable jury could have found the evidence of ID sufficiently substantial and credible then the court of appeal can reveres on this basis. I discussed this legal standard of review on pages 31-32 of the Opening Brief, as well as in the Reply Brief.

2) As far as the DNA evidence, the Statement of Facts indicate that DNA found in a glove consistent with your DNA was established, However, the facts clearly stated the glove was found more than a block away. Further, it was dissimilar to the glove observed on the suspect's hand in the surveillance video. Our Reply Brief did not make these facts clear, so I will argue them during Oral Argument that currently is scheduled for June 2, 2008 in Santa Ana.

3) The failure of matching any latent fingerprints or DNA on any surfaces that the suspect touched with you is very significant. I

reviewed the Reporter's Transcript and there is a reference to those latent prints being lifted and no match. Again, I will point that out in Oral Argument as I argue that "lack of evidence" is very significant because if the suspect were in fact you, there should have been a match. This will go toward the fact that there was *not* sufficient credible evidence to convince a reasonable jury beyond a reasonable doubt.

4) The newspaper article that was photographed was, in my opinion, clearly staged. I did not include much discussion on that because I wanted to see if the Attorney General picked up on that and argued it in their Respondent's Brief. They did. Rather than point this out in our Reply Brief, I wanted to argue this orally when I can catch the AG by surprise. That, I have found, gets the attention of the appellate court justices more effectively than if it simply gets buried in the Reply Brief. Thank you for pointing this out, however. Your comments and insights are very helpful and much appreciated.

5) This issue cannot be raised in the appeal because it is not part of the record. However, it is a very good issue for a subsequent Writ of Habeas Corpus petition where we can really flesh it out.

The AG talked about the various items of evidence that tended to corroborate the shaky ID testimony. We intentionally focused on the ID testimony of witnesses in an effort to create doubt in the minds of the justices. If the eye witness testimony is questioned, it matters not if there tends to be some

corroboration, since that evidence would be insufficient to convict.

I very much agree with you that "reasonable doubt" is written all over this case. I promise you that I will continue to do everything I can to have your conviction reversed. If we are granted a new trial, I would love to represent you. I think we could really exploit the weaknesses in the case and perhaps obtain an acquittal. In any event, let's focus right now on the appeal.

I hope all is well with you. I will stay in touch.

Best wishes,

Brent F. Romney

Appendix D

Declaration of John Steadman Nilsen

I, John Steadman Nilsen, declare

1. I am petitioner in the Habeas Corpus petition of JOHN STEADMAN NILSEN, Orange County Superior Court case No. 04WF0832; Court of Appeal case No. G038070.

2. This declaration is made at the request of my habeas attorney, Correen Ferrentino, and documents my communication with my prior appellate attorney, Brent Romney, about the Petition for Review to the Supreme Court.

3. When I hired Mr. Romney to represent me on appeal, he promised to do everything legally possible to protect my rights and fight my conviction including making sure the record was "preserved" for later review in federal court if my appeal was not successful. I relied on Mr. Romney to do this. Mr. Romney knew that I might one day need to pursue further post conviction relief in my case if we lost on Appeal. On March 19, 2008, Mr. Romney stated in a letter to me regarding a question I had about appellate briefs), "this issue cannot be raised in the appeal because it is not part of the record. However it is a very good issue on habeas." Also, in a letter dated February 5, 2009, advising me that my appeal was affirmed, he wrote: "If you or your family desire, however, to pursue a writ of habeas corpus, I recommend you contact E. Thomas Dunn...."

4. In a letter dated February 5, 2009, Mr. Romney wrote to me: "I want to update you on the

status of your appeal. "on September 22, 2008, the Court of Appeal affirmed your conviction. Since that date, a Petition for Rehearing was filed and denied. S subsequent petition to the Supreme Court to hear and consider your appeal was also denied. I am dismayed by the decisions of the appellate courts in your case. However, I have now exhausted all appellate remedies in your case."

5. My appeal was affirmed on June 30, 2008. Mr. Romney never told me about this at the time. He instead waited 8 months before informing me about the appellate court decision. I did not find out about this until Mr. Romney notified me in his letter of February 5, 2009.

6. In the February 5 letter, Mr. Romney gave me the wrong date that the Court of Appeal affirmed my conviction. He wrote "On September 22, 2008, the Court of Appeal affirmed your conviction." The conviction was actually affirmed months earlier, June 30, 2008.

7. I relied on Mr. Romney to keep his promises to me and file my petition for review in the Supreme Court as he told, *he would do* and told me in writing *he did do*. If I had known that he had not done this, I would have hired another attorney to do it, or made sure I did this, so my right to have a federal court review my conviction was protected.

8. I relied upon Mr. Romney's assurances that my Petition for Review was filed. I also relied upon the incorrect dates he provided me about when my case was affirmed.

9. At no time did I cause any delay in this process nor am I at fault for my Petition for Rehearing or my Petition for Review in the Supreme Court not having been filed. After Mr. Romney notified me of the appellate court decision, 8 months after the fact, I promptly contacted appellate attorneys Bill Kopeny and on advice Correen Ferrentino, to obtain representation and help.

I declare under penalty of perjury that the foregoing is true and correct.

DATE: 9/2/09

/s/
John Steadman Nilsen
Declarant

Appendix E
Declaration of Correen Ferrentino

I, Correen Ferrentino, say:

1. I am an attorney licensed to practice law in the state of California, the U.S. District Court, Central District and the Ninth District Court of Appeal. My state bar number 172485.

2. I am the current habeas counsel for Petitioner.

3. I was retained on August 12, 2009 for purposes of seeking habeas relief.

4. Petitioner wrote to me in June of 2009 seeking assistance by way of habeas corpus relief.

5. Because I was engaged in a four week trial I was not available and was not made immediately aware of petitioner's request.

6. I received a second letter from Petitioner in July of 2009.

7. I immediately wrote to Petitioner and explained what he would need to accomplish in order to retain my services.

8. Soon thereafter I received correspondence from Petitioner indicating his desire to retain me and the necessary instruction to do so since he was incarcerated.

9. At all times Petitioner has been diligent in his

communication to me and his assistance in preparing this petition.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 18th day of September, 2009 at Santa Ana, California.

/s/

Correen Ferrentino
Attorney at Law

Appendix F

LEXSEE 2008 CAL APP UNPUB LEXIS 5306

THE PEOPLE

v.

JOHN STEADMAN NILSEN

G038070

COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION THREE

2008 Cal. App. Unpub. LEXIS 5306

June 30, 2008, Filed

NOTICE: NOT TO BE PUBLISHED IN OFFICIAL REPORTS. CALIFORNIA RULES OF COURT, RULE 8.1115(a), PROHIBITS COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY RULE 8.1115(b). THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF RULE 8.1115.

PRIOR HISTORY: [*1]

Appeal from a judgment of the Superior Court of Orange County, No. 04WF0832. William R. Froeberg, Judge.

DISPOSITION: Affirmed.

COUNSEL: Brent F. Romney; E. Thomas Dunn, Jr., for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lynne McGinnis and Andrew Mestman, Deputy Attorneys General, for Plaintiff and Respondent.

JUDGES: IKOLA, J.; SILLS, P. J., BEDSWORTH, J. concurred.

OPINION BY: IKOLA

OPINION

A jury convicted defendant John Steadman Nilsen of first degree murder (Pen. Code, § 187, subd. (a)) 1 and second degree robbery (§§ 211, 212.5, subd. (c)), and found true the special circumstance allegation he committed the murder during the commission of a robbery (§ 190.2, subd. (a)(17)(A)), and the enhancements he discharged a firearm causing great bodily injury or death (§ 12022.53, subd. (d)), and personally used a firearm (§ 12022.53, subd. (b)). In a bifurcated trial, the jury found true allegations defendant had suffered nine prior convictions. The court sentenced defendant to an indeterminate term of life without possibility of parole, tripled, and a determinate sentence of 80 years.

1 All statutory references are to the Penal [*2] Code.

Defendant contends (1) insufficient evidence supports the jury verdict because eyewitness identifications of him were inconsistent and

untrustworthy, and (2) the trial court's denial of his pretrial suppression motion was erroneous because the forcible taking of his D.N.A. sample in 1995 under former section 290.2 2 violated his Fourth Amendment right to be free from unreasonable searches and seizures. We disagree and affirm the judgment.

2 Former section 290.2 was repealed in 1988 and replaced by section 295 et seq., the DNA and Forensic Identification Database and Data Bank Act of 1998 (Act). (§ 295; Stats. 1998, ch. 696, § 2, p. 3719.)

FACTS

On the evening of January 29, 2004, Anna Peters, assistant manager of a 99 Cents Only Store, was working at the back of the store in a warehouse open only to employees. Another employee brought into the warehouse a man who was looking for a manager. Peters asked the man, "Can I help you?" Pulling a gun from his waist area, the man pointed it at Peters's chest and asked, "Where's the safe?" Peters replied, "The safe is in the front." The man stated, "I'm not kidding." Peters said, "Please calm down. The safe is in the front." "I'm gonna give [*3] you all the money." The man told Peters they would "go to the front."

They were about to exit the warehouse when a third employee, Jovani Fuerte, entered. The man grabbed Fuerte, saying he wanted money. Fuerte, seeing the man had a gun hidden in his jacket, pulled out his wallet. The man grabbed the wallet and put it in his pocket. He said he wanted more

money and asked Fuerte where the cashier or the safe box was. The man said, "Let's go to the front." He walked out of the warehouse pushing Fuerte ahead of him and holding his gun to Fuerte's back.

Peters was behind them, but at some point "not that close." She hid "in front of the end cap on the next aisle" and tried to phone 911 on a cell phone.

The man and Fuerte walked quickly to the registers at the front of the store. Shawna Wolfgram was working at a register. The man came up to Wolfgram's register and reached in. There was a "rattling" sound as the man either tried to take cash from the register tray or to take the entire tray, and Wolfgram tried to "slap it back down," "cover the money with her hands and hold the register down." Wolfgram "said, 'I'm being robbed' into the microphone." The man pulled out a gun and shot her in the [*4] chest. Wolfgram fell to the ground and turned blue. The man ran from the store, stopped at a cinder block wall in the parking lot, looked back for a second, then "jumped over the wall."

Video taken by the store's surveillance cameras captured the suspect's left hand wearing a dark glove. An investigator found a black and gray glove in a parking lot near an alley behind the wall over which the suspect had jumped.

A forensic scientist collected a swab with sufficient D.N.A. from inside the glove to enable him "to obtain a full genetic profile." He also developed a genetic profile for defendant taken from an oral swab. He determined that although there was "D.N.A. from at least three individuals" taken from

inside the glove, a profile of the major contributor was "the same as the profile obtained from [defendant's] standard." This "major profile would be expected to occur less than one in one trillion unrelated individuals within the population."

In a photographic lineup of six photographs shown to eyewitnesses on March 19 and 20, 2004, defendant's photograph was number four. Peters, the assistant manager, and Sandra Estrada, a customer who had received change from Wolfgram just before the [*5] shooting, identified the perpetrator as the man in photograph number four. Another eyewitness, Karen Birdsong (the customer at the register next to Wolfgram's), indicated at first she did not recognize anyone in the photographic lineup, but after being asked if any person was "even close," she pointed to photograph number four and said "his mustache and eyes looked similar." A fourth eyewitness, Kristian Hayes (a customer behind Estrada in Wolfgram's line), eliminated photographs one, two, three and six, but could not eliminate photographs four or five.

All four of these eyewitnesses identified defendant in court as Wolfgram's killer.

A March 24, 2004 search of defendant's apartment uncovered brushes (which can be used to clean guns) and a 99 Cents Store bag. The police also found a January 31, 2004 Orange County Register containing an article about Wolfgram's murder underneath the refrigerator. In a small fenced-in patio area outside the apartment, behind a small figurine of a Buddha in "a knot hole of [a] tree," an officer found "an expended .38-caliber shell casing . . . ." Defendant was arrested that same day.

Defendant's older brother, Ken Nilsen, with police permission, went to [*6] defendant's apartment on March 24, 2004, to "pick up and store" defendant's personal belongings. There he "located a handgun, holster, and ski mask" which he gave to the police. 3

3 The brother was "eliminated as a possible contributor to the D.N.A. detected on the inside of the glove."

A police investigator who inspected the gun found it "was loaded with five rounds" and "the chamber underneath the hammer was empty." A forensic scientist determined the gun was a .357 magnum revolver and the ammunition was Federal brand .38 special caliber bullets. He opined the fired casing found in the knot hole of the tree was fired by the gun. He further determined that "recovered fragments of the projectile from [Wolfgram's] autopsy" appeared to come from a Federal brand .38 special or .357 magnum bullet. But due in part to the "heavy impact damage" to the projectile, he could not identify or "eliminate that particular bullet as having been fired from this revolver."

As we shall discuss in further detail below, the defense presented evidence that the eyewitness descriptions of the suspect conflicted in certain respects with one another and with the defense testimony of defendant's neighbor.

Defendant's [*7] forensic expert testified that although defendant could not be excluded as a contributor to the D.N.A. inside the glove, it was not clear his D.N.A. was actually on the glove. This uncertainty resulted from the size and mixed nature

of the sample, the impossibility of knowing how many donors were in the mixed sample, the possibility that an intermediary could have transferred defendant's D.N.A. onto the glove, and the potential that D.N.A. can last for a long time, even months and years, in a sample.

Defendant's expert on eyewitness identification, a psychology professor, testified about studies done with staged test crimes that have demonstrated the risk factors involved in obtaining accurate eyewitness identification of suspects based on photo lineups. In general, for more accurate identifications, lineups should be conducted sooner rather than later. In addition, the expert testified about the reliability of cross-racial identification: "[P]eople are generally better at identifying somebody of their own racial [or] ethnic background . . . ."

Defendant presented evidence that brushes of the type found at his apartment can be bought at auto parts stores.

The parties stipulated, inter [*8] alia, that no D.N.A. "was found on the tennis shoes and shell casing found during the search of [defendant's] home," nor were his fingerprints on the "gun, holster, Buddha, shell casing, [or] rounds found in the gun" (although the Buddha "was not processed for D.N.A. or fingerprints"). In addition, fingerprints of comparison value found at the store were not defendant's.

DISCUSSION

Substantial Evidence Supported Defendant's Conviction

Defendant contends "insufficient proof was adduced to prove to a reasonable jury that he was the culprit." He argues that given the "inconsistencies in the descriptions of the perpetrator given by the various witnesses" and the "undisputed expert testimony . . . about the inherent dangers of eyewitness identifications," the jury's verdict was unreasonable.

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence -- that is, evidence that is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (People v. Rodriguez (1999) 20 Cal.4th 1, 11.) [*9] "Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (People v. Bolin (1998) 18 Cal.4th 297, 331.)

At the time of his arrest, defendant measured 6'3" tall and weighed 200 pounds. He was 46 years old at the time of the shooting. A 1985 fingerprint card records his height as 6'2", his weight at 185 pounds, his build as medium, his hair as blond, and his eyes as blue. A 1989 fingerprint card notes his height as 6'3", his weight at 190 pounds, his build as heavy, his hair as blond, and his eyes as hazel.

Defendant compares these statistics to those contained in eyewitness descriptions of him, and

concludes the eyewitness identifications were vague and/or inaccurate. The six eyewitness descriptions, given in police interviews on the day of the murder, were as follows:

> (1) Hayes "described the suspect as a male white [6'1" to 6'2"] in his late forties [or] early fifties with a skinny build, approximately [150 to 170 pounds]," "a grayish goatee," and short gray hair (protruding from under a faded blue baseball cap), "wearing a t-shirt under a light colored flannel long-sleeved shirt."
>
> (2) [*10] Peters "described the suspect as a male white, [age] 40, [6' to 6'1"], [with a] thin to medium build, approximately [180 pounds], having short black and gray hair, unknown facial hair, wearing a long-sleeved light blue possible flannel shirt with unknown color t-shirt, Levi's and unknown colored shoes." While watching the surveillance video, she identified the suspect but "pointed to his head where he was wearing a beanie . . . and said she did not remember [him] having that on when he confronted her in the warehouse."
>
> (3) Birdsong described the suspect as a "male white" "in his late forties or early fifties" approximately 6'1" tall, weighing approximately 190 pounds, with "a thick mustache that extended down past the corners of his mouth" and wearing "a grayish blue knit beanie cap, blue jean pants, and a medium gray long-sleeved sweater."

(4) Estrada described the suspect as a male white "in his fifties," approximately 6'3" to 6'5", "thin to a medium build," wearing "some type of beanie," blue jeans and a blue sweatshirt, with gray or white hair and a "sucked up and dirty" face, "deep, sunken eye sockets," and "slender facial features."

(5) Fuerte described the suspect as a male white [*11] in his forties, with short, blond hair "sticking out of a black beanie," with an unshaven mustache, weighing about 160 to 175 pounds, over six feet tall, and "tall and skinny."

(6) Jon Hook, a witness who observed the suspect run out of the store and jump over a cinder block wall, described the man as wearing "some kind of long-sleeve attire and a beanie." At trial Hook described the suspect as "about six one-ish, [with a] slender build."

Contrary to defendant's assertion that these six descriptions are replete with inaccuracies and inconsistent with one another, they share much in common and generally accord with defendant's vital statistics. All six eyewitnesses described the suspect as a (1) white man, (2) around 6'1" or slightly taller, (3) wearing a long-sleeved top (with the exception of Fuerte who did not describe any clothing) and some type of cap (with the exception of Peters who did not recall the man wore a hat in the warehouse), and (4) in his forties (with the exception of Estrada who specified in his fifties, and Hook who apparently did not mention age).

Defendant stresses he weighed 200 pounds "at the time of his arrest (less than two months after the crimes)." The eyewitnesses [*12] judged his weight as between 170 to 190 pounds (with the exception of Estrada and Hook who did not estimate his weight in pounds). In addition, Hayes called the suspect's build "skinny," and Fuerte and Hook "slender." Of course, defendant may have gained weight in the intervening two months between the shooting and his arrest. Also, the long-sleeved top worn by the suspect may have cloaked his build to a certain extent. Finally, opinions as to what constitutes a slender build, compared to a medium one, will vary with the beholder; even the official fingerprint cards designated defendant as of medium or heavy build based on a differential of only five pounds. (The fingerprint cards also conflicted on his height by one inch and his eye color, blue versus hazel.)

Defendant asserts he "did not have blonde hair," yet Fuerte described his hair as blond. But defendant fails to inform us of his true hair color or to point us to any record reference on this subject. Instead, he asserts a 1998 black and white photograph in the record shows he has "virtually no hair at all," a statement unsupported by the actual photo. Defendant's 1985 and 1989 fingerprint cards record his hair as blond at that [*13] time. Hayes, Estrada, and Peters described the suspect's hair color as, respectively, gray; white or gray; or gray and black -- descriptions defendant does not contend are inaccurate.

Defendant alleges other inaccuracies, inconsistencies, or failure of recall. He points out

Peters could not "identify [his] shoes or their color." He notes the only witness who described a gray long-sleeved sweater was Birdsong. He quibbles that he is not exactly 6'1." He complains Hayes is the only witness who saw a gray goatee or a faded blue baseball cap. He observes Estrada is the only one who saw a sucked up, dirty face. He contrasts the eyewitness descriptions with his neighbor's testimony for the defense that defendant was tall "and regular," not "overly" or "real skinny," and the neighbor did not recall him having a beard or "Fu Manchu mustache" or ever looking "scruffy" or "dirty."

These purported inconsistencies or inaccuracies do not render the jury's verdict unreasonable. "[W]hen the circumstances surrounding the identification and its weight are explored at length at trial, [and] where eyewitness identification is believed by the trier of fact, that determination is binding on the reviewing [*14] court." (In re Gustavo M. (1989) 214 Cal.App.3d 1485, 1497.) "Apropos the question of identity, to entitle a reviewing court to set aside a jury's finding of guilt the evidence of identity must be so weak as to constitute practically no evidence at all. [Citations.] The strength or weakness of the identification, the incompatibility of and discrepancies in the testimony, if there were any, the uncertainty of recollection, and the qualification of identity and lack of positiveness in testimony are matters which go to the weight of the evidence and the credibility of the witnesses, and are for the observation and consideration, and directed solely to

the attention of the jury . . . ." (People v. Lindsay (1964) 227 Cal.App.2d 482, 493-494.)

Moreover, additional substantial evidence (besides the eyewitness identifications) supported defendant's conviction: the dark glove seen on the surveillance video and found on the suspect's escape route; the D.N.A. inside the glove to which defendant was a major contributor; the fired .38 caliber casing in a tree outside his home; the discovery in his apartment of a newspaper article on the killing, several brushes, and the .357 handgun which fired [*15] the expended shell and could not be excluded as the weapon that shot Wolfgram; and the "Federal" brand shared by the ammunition in the gun and the bullet that killed Wolfgram. Accordingly, defendant's substantial evidence challenge to his convictions fails.

The Trial Court Did Not Err by Denying Defendant's Suppression Motion

Defendant filed a section 1538.5 pretrial motion to suppress evidence, arguing, inter alia, the 1995 taking of his D.N.A. without his consent pursuant to former section 290.2 constituted an illegal seizure. 4 The court denied defendant's suppression motion, except as to four items irrelevant to the issue at hand.

4 The People's opposition to the suppression motion alleged that in 1995, defendant was in prison serving a sentence for kidnapping, robbery, assault with a deadly weapon (firearm), and other felony counts.

On appeal, defendant contends the court should have granted his suppression motion because he "would not have even been a suspect in this case absent a cold 'hit' which indicated a potential match between the D.N.A. sample found in the glove . . . and a D.N.A. sample [he] was compelled to provide in 1995 . . . ." He argues the taking of his D.N.A. in [*16] 1995 violated his Fourth Amendment right to be free from unreasonable searches and seizures, and concludes "the evidence seized in this case, including the identity of [defendant] as a suspect, is fruit of the poisonous tree."

Defendant acknowledges "his argument is contrary to currently controlling case law" -- noting the D.N.A. data base statute "has been upheld not only in California's appellate courts . . ., but in the Ninth Circuit Court of Appeals" -- but "wishes to preserve the issue for further appellate review."

"'DNA data base and data bank acts have been enacted in all 50 states as well as by the federal government. [Citations.] Various constitutional challenges to these acts have been rejected consistently. [Citation.] A challenge to former section 290.2, the predecessor of the Act, was rejected in this state by People v. King [2000] 82 Cal.App.4th 1363 . . . . The various decisional authorities addressing and rejecting constitutional challenges to state DNA data base and data bank acts are collected in the Annotation, Validity, Construction, and Operation of State DNA Database Statutes [(2000)] 76 A.L.R. 5th 239.['] [P] 'In view of the thoroughness with which constitutional [*17] challenges to DNA data base and data bank acts have been discussed, there is little we would venture

to add. We agree with existing authorities that (1) nonconsensual extraction of biological samples for identification purposes does implicate constitutional interests; (2) those convicted of serious crimes have a diminished expectation of privacy [which specifically extends to the person's identity ([citation])] and the intrusions authorized by the Act are minimal; and (3) the Act serves compelling governmental interests. Not the least of the governmental interests served by the Act is "the overwhelming public interest in prosecuting crimes accurately." [Citation.] A minimally intrusive methodology that can serve to avoid erroneous convictions and to bring to light and rectify erroneous convictions that have occurred manifestly serves a compelling public interest. We agree with the decisional authorities that have gone before and conclude that the balance must be struck in favor of the validity of the Act.'" (People v. Adams (2004) 115 Cal.App.4th 243, 257-258, (Adams).)

The Ninth Circuit agrees: "In light of conditional releasees' substantially diminished expectations of privacy, the [*18] minimal intrusion occasioned by blood sampling, and the overwhelming societal interests so clearly furthered by the collection of DNA information from convicted offenders, we must conclude that compulsory DNA profiling of qualified federal offenders is reasonable under the totality of the circumstances. Therefore, we today realign ourselves with every other state and federal appellate court to have considered these issues-squarely holding that the [DNA Analysis Backlog Elimination Act of 2000] satisfies the requirements of the Fourth Amendment." (U.S. v.

Kincade (9th Cir. 2004) 379 F.3d 813, 839, fn. omitted.)

Defendant argues "binding United States Supreme Court precedent . . . requires a 'special need' beyond that of ordinary law enforcement in order to engage in a balancing of competing interests of the government and the person tested." This argument echoes the Adams defendant's contention the appellate court was required to "identify a '"special needs" beyond the normal need for law enforcement' before undertaking a balancing analysis." (Adams, supra, 115 Cal.App.4th at p. 258.) The Court of Appeal rejected that assertion, explaining it "overlooks the fact that the class of persons [*19] subject to the Act is convicted criminals, not the general population. As stated above, convicted criminals do not enjoy the same expectation of privacy that nonconvicts do. The cases on which defendant relies involved different populations of test subjects. [Indianapolis v. Edmund (2000) 531 U.S. 32,] 41, involved motorists being stopped at drug interdiction checkpoints for the primary purpose of uncovering evidence of criminal wrongdoing. Ferguson [v. Charleston (2001) 532 U.S. 67,] 77-78, involved state hospital obstetrics patients who had an expectation of privacy in their medical records and who were subjected to an invasion of privacy which was 'far more substantial' than in the cases of other drug test subjects." (Ibid.) Here, defendant's reliance on National Treasury Employees Union v. Von Raab (1989) 489 U.S. 656 to assert the necessity for a "special needs" analysis, is similarly misplaced, since that case involved employees of the United

States Customs Service seeking "transfer or promotion to certain positions." (Id. at p. 659.)

Finally, defendant argues a law requiring an invasion of a parolee's or inmate's Fourth Amendment rights must "serve [*20] a legitimate penological interest," relying on Turner v. Safley (1987) 482 U.S. 78. But that case explained that "when a prison on regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." (Id. at p. 89, italics added.) We are not dealing here with a prison regulation.

DISPOSITION

The judgment is affirmed. lKOLA, J.

WE CONCUR: SILLS, P. J., BEDSWORTH, J.